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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, Defendant-Appellant

v.

COUNCIL OF GREENBURGH CIVIC ASOCIATIONS
and SAW MILL VALLEY
CIVIC ASSOCIATION, Plaintiff-Appellees
and Cross-Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT
on
CROSS-APPEAL
of
APPELLEES
PURSUANT TO RULE 12.4

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QUESTIONS PRESENTED

This case presents the following substantial constitutional questions, which are believed to be of the first impression (except as reported below):

1. Whether 18 U.S.C. §1725 may constitutionally deprive representative non-commercial citizen groups and individuals of access to the traditional, community custom-sanctioned use of regulated quasi-public

residential mail receptacle facilities, so as effectively to preclude the most appropriate and only practicable means to the exercise of the rights of free speech and thereby the means to exercise the cognate First Amendment right peaceably to assemble, as factually confirmed by the trial record below?

2. Whether enforcement of the provisions of 18 U.S.C. §1725 as against non-commercial groups and individuals with little or no financial resources, as a matter of undisputed practicality confirmed by the trial record below, renders the protections and privileges of the First Amendment available only to those with such relatively large financial means who can readily afford payment of the substantial de facto "stamp tax" levied by the United States Postal Service on the exercise of the rights of free speech and the cognate right of the people peaceably to assemble?

3. Whether enforcement of the provisions of 18 U.S.C. §1725 against candidates for public office denies effective access to the traditional and only practicable method of exercising the right to political association and expression to all but those few enjoying the substantial finances necessary to permit payment of the de facto tax levied by the Postal Service upon the effective exercise of such rights, as factually confirmed by the trial record below?

4. Whether enforcement of 18 U.S.C. §1725 as against local municipal government districts, which precludes effective access to the only practicable effective means of municipal public interest news distribution, as factually confirmed by the trial record below, thereby denies en masse the rights of the community and its individual citizen constituents to the traditional method of exercising their rights of free expression and speech?

5. Whether the deposit of non-commercial, unstamped civic pamphlets in residential mail receptacles may be constitutionally interdicted by 18

U.S.C. §1725, where the trial record below confirms that such method has for many years past, traditionally and by commonly accepted community custom, constituted the predominantly effective and practicable means of communication readily available for the non-affluent great majority of the citizenry to exercise meaningfully their rights of free speech, political expression and association and the cognate constitutional right of the people peaceably to assemble and petition their government for redress of claimed grievances?

6. Whether enforcement of 18 U.S.C. §1725 operates to impair the system of freedom of expression by seriously curtailing the free flow of information to which the public is constitutionally entitled, thereby interdicting the penumbral First Amendment constitutional right to receive?

7. Where the trial record below confirms the status and activities of the Civic Plaintiff-Appellees as being nationally representative of such similar groups situated throughout the United States,

(a) Whether the District Court committed constitutional error and denied equal protection of the laws by limiting the scope of its judgment exclusively to civic organizations situated within the Town of Greenburgh, County of Westchester, State of New York, and

(b) Whether the Postal Service may constitutionally issue regulations which purport to establish procedures for the enforcement of 18 U.S.C. §1725 against like civic groups throughout the entire United States, except for the single Township in which the Civic Appellees are situated?

8. If the Court decides that unstamped non-profit, non-commercial public interest communications may be inserted by civic representatives in residential mailboxes without interference or prosecution by the

Postal Service acting under color of 18 U.S.C. §1725, whether the judgment below should be expanded to afford equal protection under the First Amendment to non-profit, non-commercial communications in the public interest distributed in a similar manner by or on behalf of candidates for public office, political, governmental and educational entities in furtherance of the inalienable constitutional rights of resident constituents of the Plaintiff-Appellee Civic Associations entitling them to receive, consider, accept, reject and otherwise act upon such communications and to assist them in the exercise of their responsibilities as citizens of the United States entitled by such citizenship to participate effectively in its constitutionally guaranteed Republican Form of Government?

NOTICE OF CROSS-APPEAL

Pursuant to Rule 12.4 of the Rules of this Court, in response to the Appellant's Jurisdictional Statement filed with the Court on or about October 16, 1980 and received by the Plaintiff-Appellees in the mail October 20, 1980, the Appellees hereby respectfully cross-appeal from the order and judgment of the United States District Court for the Southern District of New York dated April 24, 1980 and May 19, 1980, respectively, only insofar as the adjudication of unconstitutionality and injunction against enforcement of 18 U.S.C. §1725 is therein expressly limited to the 56 civic organizations specified therein and to those civic associations situated solely in the Town of Greenburgh thereafter becoming members in good standing of the Council of Greenburgh Civic Associations which apply through Appellees for inclusion in the list of organizations enumerated in the judgment below.

If this Court should determine, as Appellees respectfully contend, that the record of the trial below clearly demonstrates that 18 U.S.C. §1725 unconstitutionally abridges their First Amendment rights to freedom of expression, assembly and petition

against governmental grievances, as well as certain other cognate constitutional rights under the First Amendment, the Appellees hereby respectfully cross-appeal and petition this Court to modify the judgment below to the extent that the constitutional rights afforded thereunder should not be restricted to the Town of Greenburgh, but should inure throughout the jurisdiction of the United States and its Postal Service (a) to all persons or entities similarly situated engaging in non-profit, non-commercial communications affected with a public interest and pamphleteering, (b) to all persons exercising their rights of political association and expression, and (c) to all municipalities, educational bodies and public improvement districts acting in the public domain and on behalf and for the benefit of individual citizens and taxpayers engaged in exercising rights of free speech and the unabridged dissemination, exchange, receipt and independent evaluation of non-commercial communications affected with an overriding public interest, all in furtherance of their effective participation in a Republican Form of Government.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Hon. Wm. C. Conner, J., presiding) on remand (Appellant's Jurisdictional Statement, at Appendix A, 1a-12a) is reported at 490 F. Supp. 157. The opinion of the Court of Appeals for the Second Circuit (Smith, Meskill and Kaufman, C.J.) remanding the case to the District Court for trial of the constitutional issues (Appellant's Jurisdictional Statement, at Appendix B, 13a-19a) is reported at 586 F. 2d 935. The original opinion of the District Court dismissing the complaint without trial of the controverted issues (Appellant's Jurisdictional Statement, at Appendix E, 23a-31a) is reported at 448 F. Supp. 159.

JURISDICTION

The judgment of the District Court (Appellant's Jurisdictional Statement, at Appendix C, 20a-21a), declaring 18 U.S.C. §1725 unconstitutional and enjoining its enforcement against the Defendant-Appellant Postal Service, was dated May 19 and entered on May 20, 1980. Appellant's notice of appeal to this Court (Appendix D, infra, 22a) was filed on June 18, 1980. On August 6, 1980, Mr. Justice Marshall extended the time for docketing the appeal to and including October 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1252, and Rule 12.4 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. 1725 provides:

> Whoever knowingly and willfully deposits any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postal Service for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon, shall for each such offense be fined not more than $300.

STATEMENT

The present appeal raises the substantial constitutional issues - prevalent throughout the United States, but here posed by a case of the first impression (except as reported below) - of whether the various rights under the First Amendment to the United States Constitution may be interdicted by 18 U.S.C. §1725 (and the correlative Postal Regulations promulgated thereunder by 39 C.F.R. 111.1) in such a way as to preclude effective utilization of the traditional, community-sanctioned and sole practicable means of the exercise thereof for a vast segment of the American people. The trial record in the Court below confirms that the provisions of 18 U.S.C. §1725, as enforced by the Postal Service, have as an inevitable consequence the denial of the rights of free speech and free press, upon which the cognate right of the people peaceably to assemble is inherently interdependent, to all but the economically affluent few and the politically influential elite.

Based upon established constitutional concepts heretofore established by this Court, the United States Court of Appeals established criteria in this case, one of national import with country-wide implications of the first impression, to serve as a guide to the District Judge, sitting without a jury, in determining whether 18

U.S.C. §1725 could pass constitutional muster. 586 F. 2d 935.

The Appellee-Plaintiff Civic Associations contended below that the clear language of 18 U.S.C. §1725, its legislative history and applicable concepts of statutory construction, warranted a holding that the subject enactment applied exclusively to commercial distributions, and not to those of the Appellees, the political candidates or the municipalities giving evidence in the proceedings below. The Court of Appeals did not resolve this non-constitutional issue. 586 F. 2d 935, 938-939, fn. 5. However, the trial record clearly supports the judicial finding below that 18 U.S.C. §1725 is inherently violative of the most basic First Amendment rights.

The trial testimony, which may be submitted to the Court in the joint appendix, reflects the diversity, geographically as well as functionally, of the non-commercial civic, political and municipal interests whose constitutional rights are practicably and indisputably impaired by enforcement of 18 U.S.C. §1725. The Postal Service wholly failed to substantiate its claim that such exercise of First Amendment rights did, in any real or substantial way, impede the delivery, security or revenue of the mails.

There is no dispute that, by reason of the enforcement threats of the Postal Service, acting under color of 18 U.S.C. §1725, certain governmental interests have been placed in confrontation with inalienable constitutional rights safeguarding free civic speech of paramount importance to the subsistence of this Republic, in consequence of which definitive appellate review seems clearly warranted in the national interest. In view of the previous scrutiny of the pleadings and formulation of evidentiary guidelines by the United States Court of Appeals for the Second Circuit, upon remanding the case for trial of the controverted facts, the record culminating in the judgment rendered below after trial would appear to

have been adequately developed, and hence ripe for authoritative nationwide resolution of these meritorious constitutional issues by this Court, presented in a significant, genuinely adversarial case and controversy of first impression. The Civic Appellees respectfully contend, however, that where the postal power has been misdirected by the Postal Service and put in a position of irreconcilable conflict with the First Amendment, the precedents established by this Court confirm that the latter must prevail. The Appellees concur in the prescient statement of the Solicitor General in Footnote 5 at Pages 4-5, of the Jurisdictional Statement on behalf of the Postal Service that:

> "...it can be expected that numerous groups...will seek to enjoin enforcement of Section 1725 on the ground that it abridges their First Amendment rights. A nationwide case-by-case adjudication of these questions, without authoritative guidance from this Court, would waste judicial resources and be unnecessarily expensive and burdensome for the Postal Service."

and, the Appellees would respectfully suggest, for federal taxpayers and civic groups throughout the Nation, as well. Unless an appellate determination of national constitutional magnitude can be rendered by this Court, it appears probable that a plethora of virtually identical litigation is likely to proliferate throughout the Federal judicial system.

Upon the trial, substantial evidence demonstrating the unconstitutionality of the statute was presented by broadly diversified responsible witnesses of factual circumstances with national dimensions, extending greatly beyond the interests and boundaries of the Town of Greenburgh and its Civic Appellees. Civic volunteers, public officials, and political candidates from Westchester and Queens Counties, New York, from New Jersey and Connecticut

testified in support of the factual erosion of their First Amendment rights resulting from attempted Postal Service enforcement of 18 U.S.C. §1725. (Stenographer's Minutes Transcribing Testimony on the Trial before the District Court, of which one complete photocopy has been submitted with the manually signed original of this Statement for reference purposes, and a second counterpart earlier furnished the Solicitor General under transmittal letter of counsel dated June 10, 1980, hereafter referred to as the "Trial Transcript" or "T", followed by the pertinent page number(s) in the 640-page typewritten Trial Transcript, in this instance T 73, 102, 309, 332, 605).

The record in the United States Court of Appeals will further demonstrate the submission on prior summary judgment proceedings of affidavits from representative civic individuals situated in Connecticut, New Hampshire and Colorado similarly attesting thereto (Joint Appendix on Appeal No. 78-6105 in the Court of Appeals for the Second Circuit, 586 F. 2d 935, setting forth the Complaint, Answer and Pre-Trial Motion Papers of the parties, of which a copy has been submitted with the manually signed original of this Statement for reference purposes, and a second counterpart previously furnished the Solicitor General under date of June 10, 1980 as aforesaid, hereinafter referred to as "2d Cir. A" followed by the pertinent page number(s), in this instance, 2d Cir. A 54, 81, 87).

As demonstrated by the trial record, the Town of Greenburgh is broadly representative in many respects of the character of the American nation, both urban and suburban, encompassing industry, commerce, multiple dwellings, spacious estates and blighted urban renewal areas, public and private housing of considerable diversity (T 6-7, 18, 75-76, 103, 168). The Civic Appellees are similarly representative in character (T 177-180).

The pleadings and abundant proof presented on behalf of the Civic Appellees were in no sense limited for the exclusive benefit of or applicability to the Town

of Greenburgh (2d Cir. A 2-3, 12, 14-18, 25-26). Therefore, if the judgment below is found to have merit upon appellate review, the prized constitutional liberties there adjudicated should not be artificially limited to a single township, when neighboring and far distant civic representatives exhibiting uncontroverted personal experience and persuasive credibility convincingly demonstrated a common civic pattern of national constitutional infringement by reason of the provisions of 18 U.S.C. §1725. This Court is requested to take judicial notice of the post-trial rule-making proceedings of the Postal Service seeking to limit the applicability of the judgment below exclusively to the 56 civic groups enumerated therein while denying the equal protection of the laws to all others of like character throughout the nation, 45 Fed. Reg. 56054, at Col. 1, Note 1, Page 56055, August 22, 1980. Cf. 44 Fed. Reg. 40076 (7/9/79), 52832 (9/11/79).

Pursuant to the directions of the United States Court of Appeals (586 F. 2d 935), the District Court caused the parties to develop on trial the representative facts from which the constitutional determination would necessarily evolve. A review of the record below will indisputably establish the pervasive absence of any factual substantiation to justify the Postal Service's aberrational fears that a continuation of the long-established, traditional (T 141, at Lines 18-24), and sole practicable method of exercising the constitutional rights of free speech, political expression and peaceable assembly by unstamped pamphleteering in residential mail receptacles would create deleterious mail box clutter (T 31, 91, 115, 165, 315, 341-342), pose problems of security, foster crimes against the mails (T 122-123, 134, 137, 264-265, 280-281, 306-307, 408-409, 454-455, 460, 545-546, 554, 564-565, 576-578, 587-588, 596), breed invasions of privacy (T 14, 17, 149, 163, 233-238, 245, 312, 321-322), diminish Postal Service revenues (T 576-578), and generally impair the efficient operation of the Postal Service in its task of mail delivery (T 454, Plaintiff-Appellees' Trial Exhibit 48, admitted at T 460). No meaningful evidence to support this Postal

Service argument was presented to the trial Court (T 408-409, 415-417, 454-461, 554, 576-578; Postal Service Trial Exhibits U-1/U-4, V, W-1/W-2, X-1/X-9, Y-1/Y-6, BB-1/BB-7, CC, DD, EE, GG, and HH). Conversely, the trial record further unequivocally confirms that the undisputed cost and delay occasioned by a forced civic use of postpaid mail due to 18 U.S.C. §1725 is such a substantial practical burden - not susceptible to meaningful alleviation by any viable alternative - as to constitute a de facto negation of civic First Amendment constitutional rights (T 36, 38-41, 84-91, 105-106, 111, 150-152, 167-168, 174, 179, 227-228, 236-238, 258-259, 320-321, 343, 622-623, Stipulation of Facts at Trial dated July 5, 1979, ¶5, handed up at T 181, Lines 13-20). An abundance of uncontroverted evidence to this effect was presented to the trial Court by a broad diversity -geographically and functionally -of representative civic, political and municipal officials (T 9, 77, 102, 147, 162-163, 182, 221, 230, 244, 309, 332, 608).

Two significant and uncontroverted evidentiary factors should be called to the attention of this Court, even at this preliminary stage of the proceedings. The record will reflect that the Postal Service's explicit threats directed to Appellee Saw Mill Valley Civic Association in June, 1976 (2d Cir. A 23-26) to enforce 18 U.S.C. §1725 were the catalyst for this constitutional litigation. As a result, the Saw Mill Valley Civic Association in the face of such in terrorem intended enforcement of a Federal criminal statute thereupon did dutifully cease and desist, as it was so directed by the Postal Service, from the pamphleteering-newsletter distribution by means of civic volunteer hand deposit of non-stamped material in residential mail receptacles throughout its constituent neighborhood. The Saw Mill Valley Civic Association, thus deprived of its traditional and only practicable method of free expression and community communication, by the time of trial in June of 1979 had ceased to exist as a viable citizens' community-service organization (T 191-210; cf. T 333, 339-350). Conversely, the trial record further demonstrates the practical necessities and benefit to an effective system of free expression when Appellee

Council of Greenburgh Civic Associations was required to pursue a program of civic distribution of community notices regarding a vital town reorganization referendum in June, 1979, implemented - for both financial and logistical reasons - in derogation of 18 U.S.C. §1725 (T 153-158, Plaintiff-Appellees' Trial Exhibit 20, admitted at T 150).

Our democratic society has as its linchpin the right of all to express divergent competing ideas, the value of each to be decided in the open "marketplace" of ideas. If the marketplace is to be an oligopolistic one, accessible only to society's financial and political elite and denied to the average citizen, the First Amendment and the system of free and open expression which it has spawned will become but an idealistic mirage, incapable of realization in American Society, with the inevitable withering and decay of our political processes.

The Postal Service further asserts that some ephemeral invasion of the rights of citizen privacy may be inflicted by civic First Amendment distributions made in derogation of 18 U.S.C. §1725. The alleged invasion of privacy and trespass imputed by the Postal Service against uncompensated civic volunteers in the regular course of their inserting unstamped civic notices in residential mailboxes was nowhere proven on trial. Indeed, the direct contrary was repeatedly established, in that the vast multitude of citizens welcome, read and often dramatically act in response to such public interest communications (T 14, 17, 149, 163, 233-238, 245, 312, 321-322). Despite its overwhelming resources, the Postal Service could not produce a single significant record of any residential postal patron complaining against the receipt of unstamped civic notices in a residential mailbox, which method the Court of Appeals judicially recognized "has been a prevalent practice for several decades", 586 F. 2d 935, 937, fn. 1.

Furthermore, with all the vast governmental powers at its command, the Postal Service was unable

to produce on the trial any record in the many years since the 1934 enactment of 18 U.S.C. §1725 of a civic association representative having been convicted, indicted or even credibly accused of theft, fraud, any other crimes involving the mails, or invasion of privacy while so distributing civic notices (T 122-123, 134, 264-265, 280-281, 306-307, 408-409, 454-455, 460, 545-546, 554-555, 564-565, 576-578, 587-588, 596, and Postal Service Trial Exhibits U-1/U-4, V, W-1/W-2, X-1/X-9, Y-1/Y-6, BB-1/BB-7, CC, DD, EE, GG and HH). Our society is a complex, pluralistic one where the citizenry are buffetted with ideas and distributions with which they may frequently be at odds. Residential mail receptacles are traditionally utilized for deposit of a great variety of printed ideas, some of which are read and some no doubt summarily discarded. The multitude of competing interests in our society inevitably and necessarily impose some instrusion upon any individual's privacy. But such intrusion here, if there be any at all, is so nominal that it cannot possibly be utilized to repudiate the Nation's most vital asset, namely the American Credo of free expression, grounded upon the First Amendment, for all, rich and poor alike, regardless of political, religious or civic affiliation or access to a postal meter.

The reliance of the Postal Service upon a college sociology professor's survey (Appellant's Trial Exhibit D-1, incorporating Exhibits A through D, admitted T 510, 485-486, 513-514, 519-520, 528 at Lines 23-24, 535-536) to argue that a viable alternative method of delivery may be found for civic messages is badly misplaced, for the trial record overwhelmingly confirms that no practicable alternative in truth exists to the insertion of unstamped civic communications in residential mailboxes. It is respectfully submitted that the life of the law is not theoretical social surveys purchased by the Postal Service from a scholastic university sociology department, but the real-life experience of the diverse civic representatives who testified in depth, diametrically contradicting the unsubstantiated assertions of the Postal Service, with informed conviction throughout the trial below, drawing

upon a wealth of over 140 years' collective unpaid voluntary service dedicated to community betterment (T 9, 77, 102, 147, 162-163, 182, 244, 332, 605-617). Cf. Holmes, The Common Law, p. 1 (1881).

The record below confirms, without any controversion, that the Civic Appellees, political candidates and municipal districts could not - for reasons of overwhelming financial exigency - effectively exercise their First Amendment rights except in derogation of 18 U.S.C. §1725 (T 20-21, 80-81, 186, 245, 334-336, 607). The practical effect and logically inevitable end-product of the thesis embraced by the Postal Service is to subject the availability of the free speech, press and assembly rights of the First Amendment to a strict financial means test, i.e. rationing access to the affluent and moneyed political elite, while denying access to the average citizen, the political independent and the unorganized segments of American society which are particularly vulnerable to infringement of their rights.

Therefore, after considering each of the purportedly legitimate interests of the Postal Service allegedly supportive of zealous statutory enforcement in light of the pertinent decisions of this Court, it is clear that the irreparable injury to civic free speech, press and assembly abundantly demonstrated on behalf of the Civic Appellees was properly held wholly to outweigh the interests of the Postal Service in applying 18 U.S.C. §1725 to repress civic free speech.

The jugular issue at bar is not Postal Service convenience, extracting an additional theoretical modicum in ephemeral postal revenues, the hypothetical abolition of mail theft, nor unproven invasions of privacy, but a matter of civic existence through effective, viable and practical freedom of communication by civic broadsides, pamphlets and handbills stuffed in mailboxes by door-to-door voluntary civic couriers continuing our historical tradition to the demonstrated welcome reception, and dependence, of residents throughout the community and every other

conceivably interested party, with the solitary exception of the Postal Service. The Postal Service hereby seeks the de facto authoritarian power to seize, censure, interdict and tax the door-to-door handbill forged by the Founding Fathers as the people's great weapon against tyrannical and unresponsive government. The Civic Appellees respectfully submit that 18 U.S.C. §1725 should continue to be held unconstitutional as to all non-profit, non-commercial free speech affected with an overriding public interest within the entire jurisdiction of this Court.

By their cross-appeal, Appellees seek to have the judgment of the trial court, vindicating substantial constitutional rights of Civic Appellees, affirmed and extended to encompass all non-profit, non-commercial public interest groups of any nature in their exercise of the constitutional rights of free speech and press, free assembly, free association and political expression, whether the group, individual or entity be civic, charitable, educational, municipal or political in nature.

The landmark decision of this Court in Martin v. Struthers, 319 U.S. 141 (1943), affords abundant precedent to sustain the decision below; and, indeed, it wholly repudiates any practical and logical basis of Appellant's argument. The regulatory door-to-door solicitation ordinance, as in the case at bar, was there sought to be justified on grounds of crime prevention and privacy. Justice Black, speaking for the majority, effectively disposed of this rationale, as well as those relied on by the Postal Service as a basis to sustain 18 U.S.C. §1725:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. 319 U.S. 141.

* * * *

> While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. "Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people." 319 U.S. 141, 145.

Virtually the entire trial record in this cause resolved itself in essence into testimony bearing upon these conflicting interests articulated by Justice Black.

The Civic Appellees clearly demonstrated at trial that (a) use of the regular mail, whether first class or so-called bulk-rate, was logistically time deficient in order effectively to raise the "civic call to arms", i.e. "peaceably to assemble and petition their [local] government for a redress of grievances" (T 22-24, 112-114, 152, 169-170, 189, 197, 205, 207, 249, 251-252, 255-257, 340), because first hand civic experience had demonstrated that postpaid mail could not be trusted to alert the community residents where time was of the essence in responding to local government agendas, (b) there existed no bona fide practicable alternative to the traditional method of unstamped hand deposit in residential mail receptacles, and (c) a requirement to utilize the mail system would deny effective First Amendment freedoms to virtually all but the affluent few (T 20-21, 80-81, 186, 191-210, 245, 332-336, 339-350, 607), causing these preferred freedoms to be subordinated to or rationed by financial criteria at variance with the essential concepts of a civilized democratic society.

Conversely, the testimony of Postal Service officials clearly demonstrated at trial that (a) no mailbox clutter of any nature whatever has ever been created by the customary single sheet civic flier, the Court of Appeals also pertinently observing: "It is not immediately apparent why deposit of a circular simply because a postage stamp was affixed, would be less cluttering or endangering to a letterbox." 580 F. 2d 935, 938 (T 31, 91, 115, 165, 315, 341-342); and (b) 18 U.S.C. §1725 did not have any reasonable relationship to the postal revenue (T 576-578), the security of the mail or the Postal Service's felony crime prevention program. The trial judge himself exposed the irrationality of the Postal Service argument that a $300 fine under 18 U.S.C. §1725 was a rational deterrent against serious mail crimes in his commentary: "...if you are robbing a bank, you don't worry about spitting on the sidewalk and getting arrested for that." (T 565-566). The Postal Service further argued that the security of the mail would be endangered by non-enforcement of 18 U.S.C. §1725, since "it creates suspicion if anybody not in uniform goes up to the vicinity of a mailbox" (T 138, 284-285, 294), a police state rationale plainly repudiated by Justice Black in Martin v. Struthers, supra, as insufficient to supersede the First Amendment.

The trial court also critically observed that 18 U.S.C. §1725 does not "discriminate between the good and the bad" (T 274; cf. 558, Lines 9-13, 567, Lines 23-24, 569, Lines 12-13), i.e. it prohibits both pure speech and pamphleteering, as well as purporting to inhibit criminal activities of an unspecified nature, thus being subject to challenge based upon the doctrine of overbreadth. See Cox v. Louisiana, 379 U.S. 536, 552 (1964).

The evidence developed at trial convincingly demonstrates that the logical conclusion of the argument relied upon by the Postal Service imposes a de facto financial means test as the sole criterion by

which to allocate the privileges of the First Amendment to the great majority of Americans. The Civic Appellees are not here governed nor preoccupied by the prisoner rights case of Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 629 (1977), relied upon by the Postal Service, but rather with vindicating the rights of the vast law-abiding multitudes of society; they are not felons but free citizens, earnestly striving to sustain the vital liberties afforded all peoples of this Republic.

While Congress certainly has the constitutional power to establish and regulate postal facilities, it is clear that such power must be and has long been subordinate to the First Amendment. Mr. Justice Brandeis, in dissent, noted in Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 430-431 (1921), that the power of the post may be exercised only in a manner not infringing upon the Bill of Rights First Amendment protections. See also, Mr. Justice Holmes' dissent in Leach v. Carlile, 258 U.S. 138, 141 (1922). Particularly in the realm of criminal sanctions, as were threatened here, the postal power must inexorably give ground to the overriding public policy of the First Amendment. See Hiett v. United States, 415 F. 2d 664, 667, 668, 670 (5th Cir., 1969), cert. denied 397 U.S. 936 (1970). The long established nature of this view is amply demonstrated by the holding of Mr. Justice Field in Ex Parte Jackson, 96 U.S. 727 (1877), when he noted at p. 732 that postal regulations must be enforced "consistently with the rights reserved to the people, of far greater importance than the transportation of mail".

This Court has placed the Postal Service in proper perspective relative to our basic constitutional rights. Public Clearing House v. Coyne, 194 U.S. 497, at 506 (1904):

> We find no difficulty in sustaining the constitutionality of these sections. The postal Service is by no means an indispensable adjunct to a civil

> government, and for hundreds, if not for thousands, of years the transmissions of private letters was either entrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration.
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> * * * *
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> It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defence of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function assumed and established by Congress for the general welfare. [Emphasis supplied.]

There can be no rational or logical argument that the postal power is not materially subordinate to the provisions of the Bill of Rights, with which rights it must be consistent.

Appellees do not claim to make distribution of newspapers in the modern commercial meaning of the term, nor to derive any pecuniary profit from their voluntary service in furtherance of making local governments responsive to the will of the people, but the rights they exercise are as indispensable as private property and profit to the sustenance of a society in freedom under the rule of law. However, the humble materials here distributed clearly are within the purview of the free press protections. See Lovell v. City of Griffin, 303 U.S. 444 (1938), Hughes, C. J., at p. 452:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated..." (Citations omitted).

The Postal Service argues that the Civic Appellees may exercise their First Amendment rights elsewhere and by other procedures, all of which alternative devices, the record confirms, are ineffective and impracticable. Contrary to Appellant's argument based upon rationally circumscribed prisoners' postal license in Jones v. North Carolina Prisoners Labor Union, Inc., supra, Appellees seek neither to compete commercially with the Postal Service nor to be guaranteed "entitlement to the financial resources" necessary to exercise their constitutional rights, but rather to act solely as self-reliant, proudly independent, responsible citizens engaging in the traditional and only viable method of exercising their First Amendment rights. Those First Amendment freedoms are not to be abridged in appropriate places on the plea, as here, that it may be exercised elsewhere. Thornhill v. Alabama, 310 U.S. 88, 106 (1940). The method, as in this case at bar, that is demonstrated to be the most effective - and perhaps the only effective civic modality - of protecting these rights has been properly sustained by the Court below. Wolin v. Port of New York Authority, 392 F. 2d 83, 86, 91-92 (2d Cir. 1968), cert. denied 393 U.S. 940 (1968).

Finally, the Postal Service has totally misconceived the object of the postal power; its purpose is to provide efficient delivery of the mail, not to throttle our historic, hard-won system of free expression by imposition of a tax on knowledge, "a calculated device...to limit the circulation of information to which the public is entitled in virtue of constitutional guarantees", i.e. a constitutional right to receive, "to impart and acquire information about their common interests". Grosjean v. American Press Co., 297 U.S. 243, 250 (1935).

CONCLUSION

Probable jurisdiction should be noted.

The Questions Are Substantial

Disposition of this cause by summary reversal of the judgment rendered after trial below, as suggested by the Postal Service at the Conclusion of its Jurisdictional Statement, by precluding the submission of briefs and oral argument by the parties and hampering detailed examination of the Trial Record by this Court, would be contrary to the interests of justice and a disservice to the thoughtfully considered determination of the grave constitutional questions of the first impression posed by this appeal, which are ripe for and needful of this Court's timely adjudication.

Waiver of Motion to Dismiss or Affirm

Pursuant to Rule 16.4 of the Court, the Appellees hereby expressly waive the right to file a motion to dismiss the Appellant's appeal or summarily to affirm the judgment below, in response to the Appellant's Jurisdictional Statement received October 20, 1980, in order that the substantial constitutional questions presented by this case and believed to be of the first impression (except as reported below) may be fully considered on the merits by the Court.

Respectfully submitted,

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